UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent-Appellant, vs. VERON ATCHLEY, Petitioner-Appellee.	)	No. 22735

APPELLANT'S CLOSING BRIEF

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ARGUMENT

I.

THE UNITED STATES DISTRICT COURT ERRED IN ORDERING THE CALIFORNIA COURTS TO HOLD A HEARING ON THE VOLUNTARINESS OF PETITIONER'S RECORDED STATEMENT.

A. Appellee's confession was voluntary as a matter of law.

Appellee, relying upon Darwin v. Connecticut, ___ U.S. ___; 20 L.Ed. 2d 630 (1968) and Greenwald v. Wisconsin, ___ U.S. ___, 20 L.Ed.2d 77 (1968), urges this Court to hold his statement involuntary as a matter of law.

In Darwin v. Connecticut, supra, the trial court excluded Darwin's first two confessions as involuntary but admitted his third confession. The United States Supreme Court noting that "the officers kept petitioner incommunicado for thirty to forty-eight hours during which they sought and finally obtained his confession" without a break in the stream of events sufficient to insulate the third confession from the two concededly involuntary confessions which

preceded it set aside his conviction. Darwin v. Connecticut, supra, at 633-634. In the instant case Atchley was allowed to summon his friend Travers to the jail and receive him as a visitor. Hence, there can be no inference that the police sought to keep appellee incommunicado in order to obtain his confession or that they had anything to do with his initial statement to Travers. Compare, Malloy v. Hogan, 378 U.S. 1, 7-8 (1964).

Greenwald v. Wisconsin, supra, does not support an argument that this Court can find appellee's confession involuntary as a matter of law. Stewart, J., dissenting in Greenwald v. Wisconsin, supra, at 80, noted that the voluntariness of Greenwald's confession was raised by the United States Supreme Court on its own motion and decided without Wisconsin having any opportunity to brief or argue the question on its merits. Furthermore, Greenwald is distinguishable from the instant case on its facts. Prior to giving any statement Greenwald was deprived of food, medicine and sleep, then subjected to two and three-quarter hours of interrogation by the police. Travers, to whom appellee spontaneously gave his initial statement, was allowed to visit Atchley at the latter's request, within thirty-six hours of his arrest.

This Court should not, as appellee suggests, find his confession involuntary as a matter of law because the District Court did not hold an evidentiary hearing on this

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issue.[1/] The only evidentiary hearing ever held to resolve this issue was that held by the state trial court which appellee attacks as inadequate. The District Court determined that it could not find appellee's statement involuntary without an evidentiary hearing which they decreed should take place in the state trial court. We submit that this Court should not, on the basis of this record, find appellee's statements to be involuntary as a matter of law. We do, however, contend that this Court can find appellee's statement voluntary as a matter of law. See Appellant's Brief, pp. 3-14.

B. The trial court's hearing was adequate.

Appellee, relying on Boles v. Stevenson, 379 U.S. 43 (1964), contends that the trial court's admission of his statement over objection to its voluntariness was not a sufficient finding to satisfy the requirements of Jackson v. Denno, 378 U.S. 368 (1964). At the time Boles was tried, West Virginia practice required that a preliminary hearing be held in the absence of the jury whenever a statement offered into evidence was objected to on the grounds of voluntariness. Without holding such a hearing the trial court overruled Boles' objection and admitted his statement. In the instant case, the trial court retired to chambers and

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1. It must be noted that there has never been an evidentiary hearing in the Federal Courts on the issue of the voluntariness of appellee's statements. It is important to recall that the order of the District Court from which we have appealed followed a hearing on our return to the District Court's order to show cause and did not result from a factfinding evidentiary hearing.

heard the evidence it considered relevant to determining voluntariness prior to admitting the statement.[2/] We submit that the question of the voluntariness of appellee's statement was clearly resolved when the trial court, "duty bound to withhold . . . [the statement] from the jury's consideration" if found to be involuntary [People v. Gonzales, 24 Cal.2d 870, 876 151 P.2d 251, 254 (1944)], allowed the statement to go to the jury over an objection to its voluntariness.

Appellee complains that most of the evidence he sought to present on the issue of voluntariness at the hearing held in chambers was eventually heard by the jury who were not instructed on the issue of voluntariness. He contends that the hearing on the issue of voluntariness was thus held in the presence of the jury and this violates the rule established by United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968); Johnson v. United States, 390 F.2d 517 (9th Cir. 1968); and Turner v. United States, 387 F.2d 333 (5th Cir. 1968).

United States v. Nielsen, supra, involved a situation where the jury heard evidence that the defendant, upon

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2. We submit that upon the state of this record it cannot be contended that the trial court did not hold a hearing on the issue of voluntariness. It can, as appellee does, be arged that the trial court erred in refusing to hear evidence which appellee considered properly presented on the issue of voluntariness. However, from the record presented on voir dire the trial court found, regardless of the extent of the evidence on the issues Atchely sought to develop, that upon examination of "the totality of the circumstances" it could not be said that he had been denied "a free choice to admit, to deny, or to refuse to answer" and thus his statement was admissible. See, Lisenbo v. California, 314 U.S. 219, 241 (1941); and Appellant's Brief, pp. 9-14.

being questioned by the F.B.I., had availed himself of his constitutional right to remain silent. The Seventh Circuit held it was reversible error to allow the jury to hear this inadmissible evidence because from it they might have inferred defendant's guilt. Of course, Atchley's statement has never been held to be inadmissible and thus we submit Nielsen is not analogous. In Johnson v. United States, supra, no hearing on the issue of voluntariness was ever held and we submit it cannot be authority for overruling, Pinto v. Pierce, ___ U.S. ___ 19 L.Ed.2d 31 (1967). Johnson holds that in this Circuit the District Courts must follow the preferred procedure by holding hearings on voluntariness apart from the jury. This does not however, create a constitutional standard. Finally, Turner v. United States, supra, holds that the District Court committed a procedural error in failing to hold the hearing on voluntariness outside the presence of the jury. Reversible error occurred because the trial court failed to allow the defendant an opportunity to testify on voir dire. In the instant case, appellee had an opportunity to testify on voir dire outside the presence of the jury.

We submit that United States v. Nielsen, supra; Johnson v. United States, supra, and Turner v. United States, supra, do not overrule Pinto v. Pierce, ___ U.S. ___ 19 L.Ed.2d 31 (1967), and if the hearing on voluntariness was held in the presence of the jury it would not be constitutional error. Of course, it is better procedure to hold such a hearing in the absence of the jury since the

trial court runs the risk of having to declare a mistrial if the statement is found to be involuntary. But, it is not a constitutional requirement. Compare, United States v. Feinberg, 383 F.2d 60, 69-70 (2nd Cir. 1967), cert. denied, 19 L.Ed.2d 836 (1968).

Absent a request by appellee, Jackson v. Denno, supra, does not compel a trial court to resubmit the issue of voluntariness of a statement to the jury after having concluded that the statement was voluntary. Indeed, a requirement that this issue must, without a request by the defendant, be submitted to the jury as well as the judge would be a serious interference with a defendant's choice of trial tactics. See United States v. Anderson, 394 F.2d 743, 747 (2nd Cir. 1968). Where, as in the instant case, there was no conflict in the evidence presented to the trial court as to the circumstances surrounding the defendant's statements [the only issue being the legal effect of those events upon the voluntariness of the statements], there was no evidence presented to the jury requiring an instruction on the issue of voluntariness. Compare Commonwealth v. Howard, 212 Pa.Super. 100; 239 A.2d 829 (1968).

Appellee contends that at a hearing on the issue of voluntariness the prosecution is required to prove voluntariness "beyond a reasonable doubt." We submit that there is no constitutional requirement that the trial court must find the confession voluntary "beyond a reasonable doubt." A confession is not an element of the crime charged and, the trier of fact need only be persuaded of the defendant's

guilt "beyond a reasonable doubt." Voluntariness of a statement is a question of fact which need only be resolved "by a preponderance of the evidence." If, after resolving all questions of fact "by a preponderance of the evidence" the trier of fact is persuaded "beyond a reasonable doubt" of the guilt of the accused then he may be properly convicted. Compare, United States v. LaVallee, 282 F.Supp. 718, 721 (S.D. N.Y. 1968); and Commonwealth v. Rundle, 429 Pa. 141; 239 A.2d 426 (1968).

In summary, we contend that the District Court improperly concluded that a hearing was required in order to determine the voluntariness of appellee's statements because, at the time of appellee's trial, California followed the so-called "Massachusetts Rule" and therefore, the admission of appellee's statement over an objections to its voluntariness is a sufficient finding to satisfy Jackson v. Denno, supra. Compare, People v. Berve, 51 Cal.2d 286, 332 P.2d 97 (1958); People v. Trout, 54 Cal.2d 576; 354 P.2d 231 (1960). Furthermore, even if the trial court did not hold a proper hearing, the California Supreme Court after a full and fair hearing on this issue resolved the matter adversely to appellee [see People v. Atchley, 53 Cal.2d 160; 346 P.2d 764 (1959)] and that determination should be upheld. 28 U.S.C. § 2254(d).

II.

THE ORDER APPEALED FROM ERRONEOUSLY DIRECTS THE CALIFORNIA COURTS TO ACT IN EXCESS OF THEIR JURISDICTION.

The District Court has ordered the state courts to hold a hearing on the voluntariness of these statements. Appellee contends that this is the proper remedy. The District Court has the power to hold this hearing itself or it can employ the procedure of convenience outlined in Jackson v. Denno, supra, and order the state courts to either hold the hearing or suffer complete reversal of appellee's conviction. We are in accord with the District Court's conclusion that the hearing on this issue, if it must be held, should be held in the state courts, preferably before the original trial court. However, there is no procedural scheme in California whereby the People can properly initiate such a hearing. Granted, it has been done in the past, but not without conflict and litigation. Compare, Williams v. Beto, 386 F.2d 16, 17-19 (5th Cir. 1967); where Williams claimed the findings of the state court were invalid because it had acted without jurisdiction.

We do not intend to indicate a total unwillingness to hold this hearing. We do request however, that jurisdiction be conferred upon the state courts by directing appellee to file a petition for habeas corpus with the California Supreme Court thereafter, the hearing may be held within the existing California procedural framework.

Appellee complains that this will place the burden of proof upon him. We submit that the procedure adopted in

Jackson v. Denno, supra, for compelling state courts to hold hearings on voluntariness does not shift the burden of proof from petitioner to respondent.

Furthermore, we do not conceive this to be an onerous burden in this case. As noted above, the instant case does not concern disputed questions of fact but rather their legal effect upon the voluntariness of appellee's statements. The District Court has decided that a hearing on appellee's allegations of involuntariness must be held. It had also determined to avail itself of the procedural convenience outlined in Jackson v. Denno, supra, to compel the state courts to hold the hearing. Regardless of whether this hearing is held in the federal or state courts it remains an evidentiary hearing whose purpose is to resolve an issue raised by appellee on collateral attack. As such the burden of proof remains on appellee, the petitioner herein.

CONCLUSION

We submit that since appellee initiated the first conversation with a friend whom he had summoned to his jail cell, the two factors for consideration on the issue of voluntariness [3/] have no bearing on the instant case and the

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3. Protection from secret inquisition, and protection from compulsion to self-incriminate. See Gallegos v. Colorado, 370 U.S. 49, 55 (1962).

order appealed from should be reversed.

DATED: November 14, 1968

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